

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MARLENE ROGOFF,

Case No.: 2:19-cv-01131-APG-NJK

**Plaintiff**

## **Order Granting in Part Motion for Judgment on the Pleadings**

V.

[ECF No. 23]

## NATIONAL CREDIT SYSTEMS,

### Defendant

8 Plaintiff Marlene Rogoff sues defendant National Credit Systems, Inc. for alleged  
9 violations of the Fair Debt Collection Practices Act (FDCPA) and related state law claims for  
10 deceptive business practices, fraud, and negligence. Rogoff alleges that she rented an apartment  
11 in Las Vegas until shortly before the lease expired on January 31, 2019. She did not renew the  
12 lease because the apartment was uninhabitable due to burglaries, hazardous property conditions,  
13 and a broken air conditioner during the summer heat, along with management's failure to  
14 promptly address these conditions. ECF No. 1-2 at 5-6. Rogoff contends she put down a \$545  
15 security deposit and left the apartment in move-in condition when she left. *Id.* at 6. Despite that,  
16 two months later National sent her a demand for \$3,854.59 without a breakdown of what that  
17 amount covered. *Id.* Rogoff disputed the charges and received a response that the charges were  
18 for painting, carpet cleaning, and 60 days of rent plus utilities. *Id.* Rogoff alleges that the  
19 painting and cleaning were not needed, that she did not owe rent because she was entitled to  
20 vacate the uninhabitable apartment, and that the security deposit should have covered the  
21 utilities, so no amounts were due. *Id.*

22 Rogoff filed her complaint in Clark County Justice Court, which National removed to this  
23 court. ECF No. 1. Rogoff objects to the removal, contending National was in default at the time

1 it removed the case. ECF No. 11. She also indicates she would request to amend the complaint  
2 to remove the FDCPA claim, but her two attempts at amendment were denied because she did  
3 not properly file a proposed amended complaint with either of her motions. *Id.* at 2; *see also* ECF  
4 Nos. 12, 19, 20, 22.

5 National moves for judgment on the pleadings, arguing that the complaint does not allege  
6 fraud or a deceptive business practice with particularity. National contends the complaint fails to  
7 state a claim for negligence because National owes her no duty of care and the economic loss  
8 doctrine nevertheless bars her claim. Finally, National argues that Rogoff fails to state a claim  
9 under the FDCPA because she does not state what acts violated the Act or what section of the  
10 Act was violated.

11 Rogoff responds that she has alleged that National sent her a fraudulent bill and then  
12 reported her to the credit reporting agencies after she disputed the bill despite knowing that the  
13 charges were fraudulent. She contends National owed her a duty to correct the mistaken charges.  
14 Finally, she contends that National violated the FDCPA by asking her to pay more than she owed  
15 and misrepresenting the amount of the debt.

16 I conclude that removal was proper even though National was in default at the time it  
17 removed. I grant National's motion as to Rogoff's fraud and negligence claims because Rogoff  
18 has not plausibly alleged fraud and she failed to respond to National's motion regarding the  
19 economic loss doctrine barring her negligence claim. But I deny National's motion as to the  
20 FDCPA and deceptive practices claims because Rogoff has plausibly alleged National  
21 misrepresented the amount she owed.

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1 **I. REMOVAL**

2 Rogoff contends National was not allowed to remove the case because it was in default.  
3 ECF No. 11. National did not specifically respond to this argument, although it sets forth the  
4 facts supporting removal in its petition for removal.

5 Rogoff filed her complaint in Justice Court on May 28, 2019. ECF No. 1-2. She served  
6 National on June 6, 2019. *Id.* National timely removed less than 30 days later. ECF No. 1; *see*  
7 also 28 U.S.C. § 1446(b) (providing that the notice of removal must be filed within 30 days after  
8 the defendant is served with the complaint). I have subject matter jurisdiction because Rogoff  
9 asserts an FDCPA claim in her complaint. *See* 28 U.S.C. § 1331 (providing for this court's  
10 original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the  
11 United States"). National thus could remove the complaint, including the supplemental state law  
12 claims. *See id.* § 1441(a) (allowing for removal from state court "any civil action brought in a  
13 State court of which the district courts of the United States have original jurisdiction"); *id.*  
14 § 1337(a) (granting supplemental jurisdiction over state law claims that "are so related to claims  
15 in the action within [the court's] original jurisdiction that they form part of the same case or  
16 controversy under Article III of the United States Constitution").

17 Nothing in the removal statutes requires a defendant to not be in default to remove a case,  
18 and Rogoff cites no authority for the proposition that a defendant who has not timely filed an  
19 answer cannot remove a case to federal court. *See Hunt v. Nationstar Mortg., LLC*, 684 F. App'x  
20 938, 942 (11th Cir. 2017) (holding that a defaulted defendant could remove where no default  
21 judgment had been entered in state court because the state court proceeding was still pending at  
22 the time of removal). I therefore have subject matter jurisdiction and there is no defect in the  
23 removal.

1 **II. MOTION FOR JUDGMENT ON THE PLEADINGS**

2 Judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is proper if,  
 3 “taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a  
 4 matter of law.” *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1042 (9th Cir.  
 5 2005) (quotation omitted). A Rule 12(c) motion is the functional equivalent of a Rule 12(b)(6)  
 6 motion. *See Harris v. Orange Cnty.*, 682 F.3d 1126, 1131 (9th Cir. 2012). Consequently, I must  
 7 determine whether the complaint contains “sufficient factual matter . . . to state a claim of relief  
 8 that is plausible on its face.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). However,  
 9 I do not assume the truth of legal conclusions merely because they are cast in the form of factual  
 10 allegations. *Id.* Rogoff must assert sufficient factual allegations to establish a plausible  
 11 entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Such allegations  
 12 must amount to “more than labels and conclusions, [or] a formulaic recitation of the elements of  
 13 a cause of action.” *Id.* at 555.

14 Additionally, fraud and claims that sound in fraud must be pleaded with particularity  
 15 under Federal Rule of Civil Procedure 9(b). “Rule 9(b) requires a party to state with particularity  
 16 the circumstances constituting fraud or mistake, including the who, what, when, where, and how  
 17 of the misconduct charged.” *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010)  
 18 (quotation omitted). Additionally, “[t]he plaintiff must set forth what is false or misleading  
 19 about a statement, and why it is false.” *Id.* (quotation omitted). In sum, the plaintiff “must  
 20 provide enough detail to give [the defendants] notice of the particular misconduct which is  
 21 alleged to constitute the fraud charged so that [they] can defend against the charge and not just  
 22 deny that [they have] done anything wrong.” *Id.* at 999 (quotation omitted).

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1           **A. FDCPA**

2           The FDCPA “prohibits debt collectors from making false or misleading representations  
 3 and from engaging in various abusive and unfair practices.” *Donohue v. Quick Collect, Inc.*, 592  
 4 F.3d 1027, 1030 (9th Cir. 2010) (quotation omitted). “The FDCPA is a strict liability statute that  
 5 makes debt collectors liable for violations that are not knowing or intentional.” *Id.* (quotation  
 6 omitted).<sup>1</sup>

7           Section 1692e(2)(A) of the FDCPA prohibits “[t]he false representation of . . . the  
 8 character, amount, or legal status of any debt.” Section 1692e(10) similarly prohibits debt  
 9 collectors from using “any false representation or deceptive means to collect or attempt to collect  
 10 any debt or to obtain information concerning a customer.” Whether conduct violates § 1692e  
 11 “requires an objective analysis that takes into account whether the least sophisticated debtor  
 12 would likely be misled by a communication.” *Donohue*, 592 F.3d at 1030 (quotation omitted).  
 13 To be actionable, the false or misleading statement must be material. *Id.* at 1033.

14           Viewing the facts alleged in the light most favorable to Rogoff, the complaint adequately  
 15 alleges a false representation of the amount of the debt. Rogoff alleges that she did not owe  
 16 anything to the apartment complex because the apartment became uninhabitable, she left the  
 17 apartment in move-in condition that did not require painting or cleaning, and the security deposit  
 18 covered whatever amounts she might owe. She alleges that without receiving any  
 19 communication from the apartment complex, she received a letter from National demanding  
 20 payment of \$3,854.59 without explanation of what that number represented. She alleges that she

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21  
 22           <sup>1</sup> The statute provides an affirmative defense for bona fide unintentional errors. *See Reichert v.*  
 23 *Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005-06 (9th Cir. 2008) (citing 15 U.S.C. § 1692k(c)).

1 called National to dispute that she owed anything, after which she received a breakdown  
 2 purporting to itemize what she owed.

3 At this stage of the proceedings, I must accept as true Rogoff's allegation that she did not  
 4 owe the apartment complex anything. Consequently, she has plausibly alleged that National  
 5 misrepresented the amount of the debt. The amount of the debt owed is material. And viewing  
 6 the allegations in the light most favorable to Rogoff, it is plausible that an unsophisticated  
 7 consumer might be misled into believing she owed that amount after being given a breakdown of  
 8 what the total amount represented even after she disputed that she owed anything. *See Crafton v.*  
 9 *Law Firm of Jonathan B. Levine*, 957 F. Supp. 2d 992, 997 (E.D. Wis. 2013) (holding that "the  
 10 inaccurate amount of debt could likely shake an unsophisticated consumer's belief in what she  
 11 did owe" after being presented with an inaccurate ledger purporting to show what was owed). I  
 12 therefore deny National's motion for judgment on the pleadings as to Rogoff's FDCPA claim.<sup>2</sup>

### 13       B. Deceptive Business Practices

14       Under Nevada's Deceptive Trade Practices Act (NDTPA), it is a deceptive trade practice  
 15 to "[k]nowingly make[] any other false representation in a transaction." Nev. Rev. Stat.  
 16 § 598.0915(15). Because this claim sounds in fraud, Rogoff must plead it with particularity  
 17 under Rule 9(b).

18       Rogoff alleges that National engaged in a deceptive business practice by continuing to  
 19 falsely represent to her that she owed money even after she told National that she did not owe  
 20 anything. I must take as true her allegations that she did not owe the amounts claimed and that

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21  
 22       <sup>2</sup> National also argues that to the extent Rogoff meant to allege a violation of the Fair Credit  
 23 Reporting Act (FCRA), she has not done so because she does not allege that she submitted a  
 dispute to a credit reporting agency. The complaint references FCRA but does not list it as a  
 cause of action. ECF No. 1-2 at 7. Rogoff does not assert in her opposition that she is asserting a  
 claim under FCRA. The complaint thus does not contain an FCRA claim.

1 she advised National of that fact but that National nevertheless sent her a breakdown of the  
2 amounts it asserted she owed and continued to demand payment. Rogoff has adequately alleged  
3 the who (National), what (falsely claiming amounts owed), when (in March and April 2019), and  
4 where and how (in letters and the breakdown) of National's alleged misconduct. She also has  
5 adequately alleged falsity because she claims she did not owe the amounts National was claiming  
6 she owed. Under Rule 9(b) she may allege generally that National knew the amounts it was  
7 attempting to charge were not owed. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other  
8 conditions of a person's mind may be alleged generally."). But even if she must plausibly allege  
9 National knew the charges were fraudulent, she alleges that she disputed the charges with  
10 National. Therefore, there is at least a plausible, reasonable inference that despite being put on  
11 notice that the charges were not owed, National still insisted Rogoff pay those amounts or her  
12 nonpayment would be reported to the credit reporting agencies.

13 Rogoff has set forth enough detail to give National notice of the particular conduct that  
14 she alleges constitutes the deceptive practice. National has sufficient information to allow it to  
15 defend against the charge and not just deny that it has done anything wrong. I therefore deny  
16 National's motion for judgment on the pleadings on this claim.

17 **C. Fraud**

18 To establish fraud, Rogoff must allege that National made "a false representation of a  
19 material fact, which [it] knew to be false; that [National] intended [Rogoff] to rely on the  
20 misrepresentation; that [Rogoff] detrimentally relied on the misrepresentation; and that the  
21 misrepresentation proximately caused damages." *Chen v. Nev. State Gaming Control Bd.*, 994  
22 P.2d 1151, 1152 (Nev. 2000) (en banc). Rogoff has not plausibly alleged she detrimentally  
23 relied on National's representation of the amount owed. To the contrary, she alleges she

1 disputed (and still disputes) that she owed anything. She does not allege, for example, that in  
 2 reliance on National's false communications, she paid a debt she did not owe. Although it  
 3 appears from the facts thus far alleged that it is unlikely Rogoff will be able to plead a fraud  
 4 claim for this reason, I will grant her leave to amend to add facts showing she detrimentally  
 5 relied on National's representations if facts exist to do so. *See Lopez v. Smith*, 203 F.3d 1122,  
 6 1127 (9th Cir. 2000) ("[A] district court should grant leave to amend even if no request to amend  
 7 the pleading was made, unless it determines that the pleading could not possibly be cured by the  
 8 allegation of other facts." (quotation omitted)).

9           **D. Negligence**

10           Rogoff does not respond to National's argument that her negligence claim is barred by  
 11 the economic loss doctrine. I therefore grant this portion of National's motion as unopposed. LR  
 12 7-2(d).

13 **III. CONCLUSION**

14           I THEREFORE ORDER that defendant National Credit Systems, Inc.'s motion for  
 15 judgment on the pleadings (**ECF No. 23**) is **GRANTED in part**. The motion is granted as to  
 16 plaintiff Marlene Rogoff's fraud and negligence claims. The motion is denied in all other  
 17 respects.

18           I FURTHER ORDER that by November 30, 2020, plaintiff Marlene Rogoff may file an  
 19 amended complaint curing the deficiencies identified in this order, if facts exist to do so. If no  
 20 amended complaint is filed, the case shall proceed on the FDCPA and NDTPA claims.

21           DATED this 2nd day of November, 2020.

22             
 23           ANDREW P. GORDON  
 UNITED STATES DISTRICT JUDGE